Supreme Court, U. S.
FILED
DEC 31 1974
MICHAEL RODAK, JR., CLERK

No. 74-132

In the Supreme Court of the United States

OCTOBER TERM, 1974

CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

JEAN GLODGETT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

BRIEF FOR THE APPELLANT

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OPINIONS BELOW

The original (J.S. App. 1A–15A) and supplemental (J.S. App. 16A–17A) opinions of the district court are reported at 368 F. Supp. 211 and 218.

JURISDICTION

The judgment of the district court (J.S. App. 18A–19A) was entered on February 20, 1974. The government's notice of appeal to this Court (J.S. App. 20A) was filed on April 19, 1974. By orders entered June 12, 1974, and July 10, 1974, Mr. Justice Marshall extended the time for docketing the appeal to August 17, 1974, and the jurisdictional statement was filed on that date.

On October 29, 1974, the Court postponed consideration of the jurisdictional question to the hearing on the merits (App. 105–106).

The jurisdiction of this Court rests on 28 U.S.C. 1253, since the decision below was entered by a three-judge court properly convened under 28 U.S.C. 2281 and 2282 to consider this action to restrain the enforcement of 42 U.S.C. 607(b)(2)(C)(ii) and Vermont Welfare Regulation 2333.1 as unconstitutional. See *King* v. *Smith,* 392 U.S. 309; *Flast* v. *Cohen,* 392 U.S. 83. As this Court recently recognized in *Hagans* v. *Lavine,* 415 U.S. 528, 543, an appeal lies to this Court where a three-judge court was properly convened, even though the court disposed of the case on a nonconstitutional ground.

QUESTIONS PRESENTED

1. Whether the district court properly held that 28 U.S.C. 1343(3), which applies to actions "[t]o redress the deprivation, under color of any State law, * * * of any right, privilege or immunity secured by the Constitution * * *," confers jurisdiction over the Secretary of Health, Education, and Welfare in this action challenging the constitutionality of 42 U.S.C. 607(b)(2)(C)(ii).

2. Whether 42 U.S.C. 607(b)(2)(C)(ii), and Vermont Welfare Regulation 2333.1, which bar families from receiving benefits under the federally-assisted Aid to Families with Dependent Children ("AFDC") program if the father receives unemployment compensation, give the father the option to decline unemployment compensation for which he is eligible in order for his family to obtain larger AFDC benefits.

STATUTES AND REGULATIONS INVOLVED

Section 407(b)(2)(C) of the Social Security Act, as amended, 42 U.S.C. 607(b)(2)(C), requires that, to be eligible for federal financial assistance, state AFDC programs must provide:

> for the denial of aid to families with dependent children to any child or relative specified in subsection (a) of this section—
>
> * * * * *
>
> (ii) with respect to any week for which such child's father receives unemployment compensation under an unemployment compensation law of a State or of the United States.

Vermont Welfare Regulation 2333.1 provides in part (emphasis in original):

> An "unemployed father" is one whose minor children are in need because he is out of work, is working part time, or is not at work due to an industrial dispute (strike), for at least 30 days prior to receiving assistance, provided that:
>
> * * * * *
>
> 3. He is not receiving Unemployment Compensation during the same *week* as assistance is granted.

Section 402(a)(7) of the Social Security Act, 42 U.S.C. 602(a)(7), requires that to be eligible for federal financial participation, a state AFDC plan must:

> except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent

children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earnings of any such income; * * *

Regulations of the Department of Health, Education, and Welfare at 45 C.F.R. 233.20 provide in part:

(a) *Requirements for State Plans.* A State Plan for OAA, AFDC, AB, APTD or AABD must, as specified below:

* * * * *

(3) *Income and resources;* OAA, AFDC, AB, APTD, AABD.

* * * * *

(ix) Provide that the agency will establish and carry out policies with reference to applicants' and recipients' potential sources of income that can be developed to a state of availability.

STATEMENT

This case arises under Title IV of the Social Security Act, 42 U.S.C. 601, *et seq.*, which governs the Aid to Families with Dependent Children ("AFDC") program. The AFDC program is designed to provide public assistance on behalf of dependent children through a system of federal and state funding. In order to receive federal funding, state AFDC plans must comply with certain requirements set forth in the Act, as implemented by regulations of the Department of Health, Education, and Welfare, 45 C.F.R. 200, *et seq.*

The AFDC program is directed primarily to children who are dependent because of the "death, continued absence from the home, or physical or mental incapacity of a parent * * *." 42 U.S.C. 606(a). In addition, state AFDC plans may include children who are dependent because of the unemployment of their father. If a state plan includes children of unemployed fathers, Section 407(b)(2)(C)(ii) of the Act, 42 U.S.C. 607(b)(2)(C)(ii), requires that the state plan provide for the denial of AFDC benefits "with respect to any week for which such child's father receives unemployment compensation * * *." The Vermont AFDC plan includes children of unemployed fathers, and Vermont Welfare Regulation 2333.1 requires denial of AFDC benefits during any week when such fathers receive unemployment compensation.

This action was brought against the Secretary of Health, Education, and Welfare and the Commissioner of Vermont's Department of Social Welfare by three families claiming AFDC benefits. Each of the families was denied benefits on the ground that the father was receiving state unemployment compensation. In each instance, the amount of the unemployment compensation was less than the amount of AFDC benefits.[1]

Plaintiffs sought to have Section 407(b)(2)(C)(ii) and Vermont Welfare Regulation 2333.1 declared invalid and their enforcement enjoined as contrary to the Due Process and Equal Protection Clauses of the

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[1] A comparison on a monthly basis of the AFDC benefits denied and unemployment compensation received by the plaintiffs is shown below (J.S. App. 2A–3A):

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Fifth and Fourteenth Amendments (App. 7–12). They also sought to represent the class of all Vermont families excluded from AFDC benefits because the father receives or is eligible for unemployment compensation (App. 11).

The three-judge district court did not reach the constitutional question because it awarded plaintiffs relief on a statutory ground. Initially, the court held that a three-judge court was appropriate under 28 U.S.C. 2281 and 2282 (J.S. App. 4A). Also, although the court's original opinion held that plaintiffs had not proved that their suit met the requisites for a class action (J.S. App. 4A–7A), its supplemental opinion states that the class action designation is largely a formality in that the judgment will bind the State as to all similarly situated persons in the future (J.S. App. 16A–17A). Jurisdiction over both state and federal defendants was sustained under 28 U.S.C. 1343(3) (J.S. App. 7A–9A).

On the merits, the court held that Section 407(b)(2)(C)(ii) affords fathers the option of refusing unemployment compensation in order to obtain the higher AFDC benefits. In its view, the language of this AFDC provision indicates "that the disqualifying factor is actual payment, rather than mere eligibility for unemployment compensation" (J.S. App. 13A).

(Continued)

	AFDC	Unemployment compensation
Glodgett	$239	$60
Derosia	394	56
Percy	410	172

The court's judgment incorporates this statutory construction holding as declaratory relief, orders Vermont to advise AFDC applicants of their option to refuse unemployment compensation, and further orders the Secretary to approve Vermont's AFDC program in accordance with the court's construction of Section 407(b)(2)(C) (J.S. App. 18A–19A). The Glodgett, Percy, and Derosia families were awarded retroactive relief since the judgment grants them the option of retendering their unemployment compensation plus any amounts received under Vermont's non-federally assisted general assistance program, in order to obtain AFDC benefits (J.S. App. 19A). By stipulation, if this option is exercised, the Glodgetts will receive a total of $207.17; the Percys, $342; and the Derosias, $21.20 (J.S. App. 19A).

As to all similarly situated Vermont AFDC applicants, the district court granted only prospective relief (J.S. App. 19A), which was conditionally stayed pending appeal or further order of the district court (App. 103–104). The stay was subject to the condition that Vermont provide supplemental financial assistance to those families who would be eligible for AFDC benefits but for the father's receipt of unemployment compensation. The amount of the supplemental assistance was stipulated to be the difference between the AFDC benefits for which the family would otherwise qualify and the family's earned or unearned income, including unemployment compensation (App. 103).

Both the state (No. 73–1820) and the federal defendants appealed from the district court's judgment.

On October 29, 1974, this Court ordered the cases consolidated, noted probable jurisdiction in Vermont's appeal, and postponed further consideration of the jurisdictional question in the federal case pending a hearing on the merits (App. 105–106).

SUMMARY OF ARGUMENT

I

Although 28 U.S.C. 1343(3) confers jurisdiction only to redress deprivations of rights "under color of any State law," the district court held that this provision confers jurisdiction over the Secretary in this action. It reached this result by applying the pendent party doctrine, which this Court recognized in *Moor* v. *County of Alameda,* 411 U.S. 693, 715, presents a "subtle and complex question * * *." The question was left open in *Moor,* and we submit that it need not be resolved here. The merits of the dispute are properly before the Court in Vermont's appeal. The Secretary will, of course, abide by the construction of 42 U.S.C. 607(b)(2)(C)(ii) adopted by this Court. In the event the case is remanded for additional proceedings—the result we advocate—we intend to resolve the jurisdictional problem by intervening pursuant to 28 U.S.C. 2403.

II

Section 407(b)(2)(C)(ii) of the Social Security Act, 42 U.S.C. 607(b)(2)(C)(ii), requires denial of AFDC benefits for any week during which the father "receives" state or federal unemployment compensa-

tion. The district court construed this section to permit the father to waive unemployment compensation which he is entitled to receive in order for his family to obtain AFDC benefits when those benefits are more than the unemployment compensation. For several reasons, however, this construction is erroneous.

The structure of the Social Security Act shows that AFDC is to be available only as a last resort. This philosophy is reflected in Section 402(a)(7), which requires states to consider all of the other income and resources available to an AFDC applicant. *Shea* v. *Vialpando,* 416 U.S. 251, 261. The evolution of the present Section 407(b)(2)(C)(ii) also plainly reveals that Congress did not intend AFDC payments to be made when unemployment compensation is available.

In addition, the longstanding administrative implementation of Section 402(a)(7) is that both actual and "potential sources of income that can be developed to a state of availability" must be considered in determining need of AFDC applicants. 45 C.F.R. 233.20(a)(3)(ix). This policy, which is entitled to deference by this Court, conflicts with the holding below that a father can refuse to accept unemployment compensation in order to obtain AFDC.

The legislative history of Section 407(b)(2)(C)(ii) expressly confirms this position. The section was originally enacted in 1968, and the Conference Report to that Act specifically describes Section 407(b)(2)(C)(ii) as barring AFDC where the "fathers * * * receive (or are qualified to receive) any unemployment compensation under State law." H. Rep. No. 1030, 90th Cong., 1st Sess. 57.

The question of the relationship between AFDC and unemployment compensation has arisen in only one other case. In *Burr* v. *Smith,* 322 F. Supp. 980 (W.D. Wash.), affirmed, 404 U.S. 1027, the decision of the three-judge district court is consistent with our interpretation of Section 407(b)(2)(C)(ii).

Finally, under the holding of the court below, the entire cost of assisting a needy family whose father is unemployed could be shifted to the AFDC program from the unemployment compensation program as supplemented by a state assistance program. This result is anomalous inasmuch as Congress has twice rejected a proposal which would have permitted AFDC to supplement, but not reduce, unemployment compensation.

ARGUMENT

I

THE DISTRICT COURT'S HOLDING THAT 28 U.S.C. 1343(3) CONFERS JURISDICTION OVER THE SECRETARY PRESENTS A DIFFICULT AND COMPLEX QUESTION WHICH THIS COURT NEED NOT RESOLVE

The district court took jurisdiction of this case solely under 28 U.S.C. 1343(3), which gives district court's jurisdiction over actions "[t]o redress the deprivation, under color of any State law, * * * of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens * * *." While the Social Security Act is not an "'Act of Congress providing for equal rights * * *'," *Almenares* v. *Wyman,* 453 F. 2d 1075, 1082, n. 9 (C.A. 2), certiorari denied, 405 U.S. 944; cf. *Georgia* v. *Rachel,* 384 U.S. 780, 792; *City of Greenwood* v. *Peacock,* 384 U.S. 808, 825,

nevertheless substantial constitutional challenges to state welfare statutes or regulations may be brought in the federal courts against state officials under Section 1343(3) and nonconstitutional claims presented in such cases may then be considered under the doctrine of pendent jurisdiction. *E.g., Hagans* v. *Lavine,* 415 U.S. 528, 536–543; *Rosado* v. *Wyman,* 397 U.S. 397, 402–405; *King* v. *Smith,* 392 U.S. 309, 312, n. 3.

By its terms, however, Section 1343(3) does not authorize jurisdiction over federal officials, who act under color of federal, not state, law. See *Wheeldin* v. *Wheeler,* 373 U.S. 647, 652; *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U.S. 388, 398, n. 1 (Harlan, J. concurring); *Gregoire v. Biddle,* 177 F. 2d 579, 581 (C.A. 2) (L. Hand, C. J.), certiorari denied, 339 U.S. 949; *Norton* v. *McShane,* 332 F. 2d 855, 862 (C.A. 5), certiorari denied, 380 U.S. 981; *Williams* v. *Rogers,* 449 F. 2d 513, 517 (C.A. 8), certiorari denied, 405 U.S. 926. In *Lynch* v. *Household Finance Corp.,* 405 U.S. 538, 547, this Court distinguished Section 1343(3) from 28 U.S.C. 1331 by stating that "in suits against federal officials for alleged deprivations of constitutional rights, it is necessary to satisfy the amount-in-controversy requirement for federal jurisdiction."[2] In accord with these deci-

[2] Although plaintiffs alleged that jurisdiction existed under 28 U.S.C. 1331 (App. 8), they conceded in the district court that their individual claims did not exceed $10,000 (See Plaintiffs' Memorandum of Law, p. 7, filed in the district court on September 20, 1972), and the judgment (J.S. App. 19A) shows that the concession was well-founded. Although plaintiffs sought to satisfy the jurisdictional amount by aggregating the claims of the purported class, such aggregation is barred by *Snyder* v. *Harris,* 394 U.S. 332, and *Zahn* v. *International Paper Co.,* 414 U.S. 291.

sions, other three-judge district courts have held that Section 1343(3) does not confer jurisdiction over the Secretary in actions challenging the constitutionality of the AFDC statute. *Stinson* v. *Finch,* 317 F. Supp. 581 (N.D. Ga.); *Ramirez* v. *Weinberger,* 363 F. Supp. 105 (N.D. Ill.), affirmed, 415 U.S. 970.

In the present case, the district court relied primarily (J.S. App. 7A) upon *Aguayo* v. *Richardson,* 473 F. 2d 1090 (C.A. 2), certiorari denied, 414 U.S. 1146. There jurisdiction over federal and state officials in an AFDC action was sustained under Section 1343 (3) by extending the doctrine of pendent jurisdiction to parties, as well as claims, not otherwise subject to the court's jurisdiction. In *Moor* v. *County of Alameda,* 411 U.S. 693, 710–717, this Court recognized that the pendent party doctrine presented "a subtle and complex question with far-reaching implications." 411 U.S. at 715. The Court found it unnecessary to decide that question in *Moor,* however, because it concluded that the district court had not abused its discretion by refusing to exercise such jurisdiction on the facts of that case.

Another possible basis for extending Section 1343 (3) to provide jurisdiction over federal officials is suggested by *Christian* v. *New York State Dept. of Labor,* 414 U.S. 614, 617, n. 3. There this Court left open the question whether Section 1343(3) confers jurisdiction over federal officials where there has been joint participation between state and federal officers. Cf. *Adickes* v. *S. H. Kress & Co.,* 398 U.S. 144. Even assuming the joint participation doctrine might be appropriate in some circumstances, its applicability

to the present case would be especially doubtful. Although "[t]he AFDC program is based on a scheme of cooperative federalism," *King* v. *Smith,* 392 U.S. 309, 316, the interests of the two sovereigns do not necessarily coincide. See *infra,* p. 28. Thus, the question of the district court's jurisdiction over the Secretary in this case is difficult and complex.

As in *Moor* and *Christian,* however, this jurisdictional question need not be resolved. If this Court agrees with the district court's interpretation of 42 U.S.C. 607(b)(2)(C)(ii) in this case in which jurisdiction over the state defendant has been properly invoked, the jurisdictional question with respect to the Secretary would become inconsequential since the Secretary as well as the State would, of course, administer the statute in accordance with this Court's interpretation. Cf. *Secretary of the Navy* v. *Avrech,* No. 72–1713, decided July 8, 1974.

If, on the other hand, this Court agrees with our view that the statute does not permit the payment of AFDC benefits to an individual who is eligible for, but declines, unemployment compensation, then the case should be remanded for the district court to decide appellees' constitutional challenges to the statute as thus construed. In that event, the government intends to end the jurisdictional controversy by filing a motion to intervene. Rule 24(a) of the Federal Rules of Civil Procedure provides for intervention as a matter of right "when a statute of the United States confers an unconditional right to intervene * * *." 28 U.S.C. 2403 provides in relevant part:[3]

[3] The fact that a federal officer was named as a party in the (Continued)

> In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality.* * *

Thus, however this Court resolves the merits of the dispute, the difficult and complex question of whether 28 U.S.C. 1343(3) provides jurisdiction over the Secretary need not be decided.

II

SECTION 407(b) OF THE SOCIAL SECURITY ACT BARS A FAMILY FROM RECEIVING AFDC BENEFITS IF THE FATHER IS ELIGIBLE FOR UNEMPLOYMENT COMPENSATION

The district court construed Section 407(b)(2)(C)(ii) of the Act, 42 U.S.C. 607(b)(2)(C)(ii), which requires denial of AFDC benefits for any week during which a father "receives unemployment compensation" (the "mandatory bar), to afford such fathers the option of refusing to accept unemployment compensation in order to obtain AFDC benefits for their families (J.S. App. 13A–14A). As we now show, however, that holding is contrary to the basic structure of

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complaint should not preclude intervention. In *Morgan* v. *Katzenbach*, 247 F. Supp. 196 (D.D.C.), reversed on other grounds, 384 U.S. 641, the United States was permitted to intervene under 28 U.S.C. 2403 even though the Attorney General of the United States was named as a defendant.

the Social Security Act, its legislative history, consistent administrative construction, and the only precedent in point. Moreover, the district court's construction of Section 407(b)(2)(C)(ii) is likely to have the anomalous result of shifting significant costs in assisting the unemployed from the state unemployment compensation program, which is funded by taxes on private employers, to the AFDC program, which is funded by general federal and state revenues.

Appellees argued in their motion to affirm (pp. 6–7) that resort to the traditional aids to statutory construction is improper because the meaning of "receives" in Section 407(b)(2)(C)(ii) is unambiguous. To the contrary, however, "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 543–544 (footnotes omitted); *Cass* v. *United States*, 417 U.S. 72, 78–79. Moreover, the meaning of the word "receives" in Section 407(b)(2)(C)(ii) should not be determined "in isolation from the context of the whole Act" (*Richards* v. *United States*, 369 U.S. 1, 11), for, as this Court has held, "* * * in fulfilling our responsibility in interpreting legislation, 'we must not be guided by a single sentence * * *, but [should] look to the provisions of the whole law, and to its object and policy'." *Ibid.* Thus, it is appropriate to consider the aids to statutory construction to which we now turn.[4]

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[4] In their complaint in the district court, plaintiffs challenged only the constitutionality of Section 407(b)(2)(C)(ii) and the

(Continued)

1. The basic structure of the Social Security Act contemplates that state unemployment compensation

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(Continued)
Vermont regulation, stating that that section "provides that assistance * * * cannot be granted if the father is eligible for or receiving unemployment compensation" (App. 9; see, Transcript of March 5, 1973, p. 2). In the memorandum supporting our motion to dismiss the complaint or alternatively for judgment on the pleadings or summary judgment, we stated, "It is the receipt of unemployment benefits and not merely eligibility for such benefits which is the operative factor here; Section 607(b)(2)(C)(ii) turns on receipt of unemployment compensation, not eligibility for such benefits." Memorandum of Law in Support of Motions of Defendant Richardson, filed August 16, 1972, p. 7, n. 2. Subsequently, after the statutory construction issue was raised at oral argument (Transcript of March 5, 1973, pp. 42–44, 55–57), we submitted a supplemental memorandum stating:

"* * * Congress did not want to cut off AFDC solely on the basis of *eligibility* for unemployment compensation, where a delay of weeks between eligibility and actual payment might result from forces beyond the recipient's control, *e.g.*, state inefficiency or red tape. On the other hand, a recipient clearly may not take advantage of Congress' concern in this area by purposefully refusing unemployment compensation for which he is eligible, thereby defeating the comprehensive unemployment-AFDC scheme of Congress." Memorandum of Law, filed March 27, 1973, p. 6.

In this memorandum the government thus clarified its earlier position. The district court's statement that the defendants concur in its view that "the disqualifying factor is actual payment, rather than mere eligibility for unemployment compensation" (J.S. App. 13A) overlooks the clarifying statement in our memorandum of March 27, 1973.

The import of the government's memoranda in the district court and the position that we urge here is that while Congress did not intend to terminate AFDC benefits prior to the actual availability of unemployment compensation, neither did it intend that a father be permitted to decline unemployment compensation. Thus, eligibility for unemployment compensation imposes an obligation to exhaust this resource (Section 402(a)(7)). Failure to apply will result in denial of AFDC, but the

programs are to be the primary source of assistance to unemployed fathers, and that the federally-aided AFDC payments will be made only where such state compensation is not available. Section 402(a)(7) of the Act, 42 U.S.C. 602(a)(7), clearly shows that AFDC is to be available only as a last resort. That section states that, except as otherwise provided, "the State agency shall, in determining need [under the AFDC program], take into consideration any other income and resources of any child or relative claiming" AFDC. As this Court recently observed, "Congress has been careful to ensure that *all* of the income and resources properly attributable to a particular applicant be taken into account * * *." *Shea* v. *Vialpando,* 416 U.S. 251, 261 (emphasis in original).

Reflecting the congressional purpose that AFDC be a program of last resort, the longstanding administrative implementation of Section 402(a)(7) has required that in determining need of AFDC applicants, a state must consider both actual and "potential sources of income that can be developed to a state of availability." Department of Health, Education, and Welfare's Handbook of Public Assistance Administration, Pt. IV, § 3120 (1964), now 45 C.F.R. 233.20(a)(3)(ix). The Handbook makes clear that this policy is particularly applicable to statutory benefits that can be developed upon application, and unemployment compensation is specifically identified as such as a resource.

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mere fact that application has been made does not result in termination of AFDC benefits until such time as unemployment compensation is received or would have been received but for a father's refusal to accept it.

Department of Health, Education, and Welfare's Handbook of Public Assistance Administration, Pt. IV, § 3140(6). Thus, the Secretary has consistently maintained that the Act "does not give any individual a right to have his needs met out of an assistance program because of his refusal to accept any resource that is available to him upon application." [5]

The district court's construction of Section 407(b)(2)(C)(ii)—the mandatory bar provision—to permit an unemployed father to refuse unemployment com-

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[5] While this statement occurs in the provision which requires an AFDC applicant to apply for reduced old-age benefits at age 62, rather than awaiting eligibility for full benefits at age 65, it is clear that this principle is equally applicable to other statutory benefits enumerated in a subsequent provision of the Handbook which incorporates the old-age benefits provision by reference. The relevant portions of the Handbook provide:

"§ 3140(4). * * * Without question, the Act intends that such individuals should have a legal right to decide whether to file for the reduced benefits or wait until they reach sufficient age to receive benefits without reduction, just as any individual has the legal right to decide that he will not apply for any OASDI benefits under any circumstances. The Federal act, however, does not give any individual a right to have his needs met out of an assistance program because of his refusal to accept any resource that is available to him upon application.

"§ 3140(6). In addition to OASDI, other statutory benefits to which applicants and recipients for public assistance may qualify, include unemployment insurance, temporary disability insurance, railroad retirement benefits, civil service retirement benefits, other government retirement benefits (Federal, State, county and local), and veterans benefits.

"It is important that the State's policies and procedures for determining eligibility on the basis of need include clear instructions to staff for identifying cases in which such statutory benefits might be a resource, and, with respect to such cases, the process of determining the availability of such resources."

pensation effectively nullifies Congress' intent that an AFDC applicant develop income from all available resources.[6]

2. The district court's construction of the mandatory bar provision is also contrary to the congressional policy concerning unemployment compensation programs. The history of Congress' adjustments of the relationship between AFDC and employment compensation demonstrates that Congress intended that AFDC not be available when unemployment compensation can be obtained.

Congress first provided incentives for states to establish AFDC and unemployment compensation programs in the Social Security Act of 1935. 49 Stat. 620. In its original form, AFDC was not available to children of unemployed fathers. Congress viewed unemployment compensation as the means by which persons temporarily out of work would be aided until they found new employment. As this Court recognized in *California Human Resources Dept.* v. *Java,* 402 U.S. 121, 131, the unemployment compensation program was intended to be the " 'first line of defense for * * * [a worker] ordinarily steadily employed',"[7] and its purpose was "to enable workers 'to tide themselves

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[6] It should be noted that development of income from resources ordinarily results in a reduction of AFDC benefits. In the case of unemployment compensation, however, development of income results in termination of AFDC benefits for the period in which compensation or could be obtained. This treatment of unemployment compensation reflects the fact that Congress regards AFDC and unemployment compensation as mutually exclusive programs. See pp. 19–21, *infra.*

[7] Quoting the Hearings before the Senate Committee on Finance, on S. 1130, Report of the Committee on Economic Security, 74th Cong., 1st Sess. 1321.

over, until they get back to their old work or find other employment, without having to resort to relief' " (quoting H. Rep. No. 615, 74th Cong., 1st Sess. 7).[8]

In 1961, the AFDC program was extended for the first time to cover children of an unemployed parent (father or mother). Under the 1961 amendment, states participating in the AFDC program were authorized, but not required, to deny part of or all AFDC benefits "if the unemployed parent * * * re-

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[8] The pertinent part of this House Report states (*ibid.*):

"In normal times [unemployment compensation] will enable most workers who lose their jobs to tide themselves over, until they get back to their old work or find other employment, without having to resort to relief. * * * Unemployed workmen who cannot find other employment within reasonable periods will have to be cared for through work relief or other forms of assistance, but unemployment compensation will greatly reduce the necessity for such assistance. Unemployment compensation is greatly preferable to relief because it is given without any means test."

Like this House Report, the Senate Report also shows that the original design was that assistance programs based on need, such as AFDC, would be made only if unemployment compensation had been exhausted or was unavailable:

"Such unemployment compensation is not a complete safeguard against the hazard of unemployment. In periods of prolonged depression many workmen will exhaust their compensation benefits before they find other employment. This will hold true of some workmen even in periods of prosperity. Supplemental to unemployment compensation there will still be need for work relief for those whose compensation rights have been exhausted, as well as for workers who are outside of the compensation system.

"But unemployment compensation does have real value for many workers. In normal times most workers will secure other employment before exhaustion of their benefit rights. * * * For the great bulk of industrial workers unemployment compensation will mean security during the period following unemployment while they are seeking another job, or are wait-

ceives unemployment compensation." 75 Stat. 76. But whether a state provided for termination or only reduction of AFDC benefits when unemployment compensation was available, the obligation to develop income from resources, including unemployment compensation, remained in force.

In 1968, Congress made the optional provision mandatory by amending the Act to require that AFDC be denied if and so long as such child's "father * * * receives unemployment compensation under an unemployment compensation law of a State or of the United States." 81 Stat. 821, 883. Again, as in 1961, the requirement that income be developed from available resources remained intact.[9]

3. The legislative history of the 1968 amendment (the mandatory bar) demonstrates that Congress intended that an unemployed father would be required to exhaust the unemployment compensation resource, and upon the availability of such benefits, AFDC would be terminated. The Conference Report on the 1968 Act explained:

> * * * Section 407 of the Social Security Act, as amended by section 203(a) of the House bill defined an unemployed father (for purposes of determining the eligibility of his children for AFDC) so as to exclude fathers who do not

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ing for a return to their old position. In most cases the compensation they will receive will be all that they will need. While unemployment compensation will not do away entirely with the necessity for relief, it should very materially reduce the costs of relief in future years." S. Rep. No. 628, 74th Cong., 1st Sess. 11–12.

[9] Had Congress intended to alter this requirement, it would have amended Section 402(a)(7).

> have 6 or more quarters of work in any 13-calendar-quarter period ending within one year prior to the application for aid, and fathers who receive (*or are qualified to receive*) any unemployment compensation under State law.
>
> The Senate amendments removed these exclusions, and restored the provision of present law under which a State may at its option wholly or partly deny AFDC for any month where the father receives unemployment compensation during the month. * * *
>
> The Senate recedes * * *.

H. Rep. No. 1030, 90th Cong., 1st Sess. 57 (emphasis added).

In their motion to affirm (pp. 12–13), appellees argue that the Conference Committee used the phrase "qualified to receive" unemployment compensation in reference to the eligibility requirement of Section 407(b)(1)(C), not to the mandatory bar provision, Section 407(b)(2)(C)(ii). But the Conference Report cannot fairly be given appellees' interpretation because the report refers to the *exclusion* of "fathers who receive (or are qualified to receive) any unemployment compensation." The eligibility provision (Section 407(b)(1)(C)) expressly *includes* such fathers where receipt or qualification to receive occurred in the preceding year, but in the mandatory bar provision *excludes* during any current week in which unemployment compensation is received or when an unemployed father is eligible to receive it.

Any doubt as to the meaning of the Conference Report is removed by the Senate Committee on Finance, which summarized the major recommendations presented to the Committee in the House version

of the 1968 Act.[10] In summarizing testimony against Section 407(b)(2)(C)(ii), the report described this provision as "*not allowing payment if father is eligible for unemployment compensation.*" Committee Print, Brief summary of major recommendations presented in oral and written statements during public hearings before Senate Committee on Finance, on H.R. 12080, 90th Cong., 1st Sess. 32. Like the Conference Committee, the Senate Committee thus also viewed the provision as barring AFDC payments to persons qualified for unemployment benefits.

Finally, when Congress used the word "receives" in Section 407(b)(2)(C)(ii), it legislated in light of the Secretary's consistent view that an applicant for AFDC must first develop income from all other resources, including unemployment compensation if available (see pp. 17–18, *supra*). Accordingly, the Secretary's view is entitled to deference under the principle that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction." *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* 395 U.S. 367, 381 (footnotes omitted); see *Lewis* v. *Martin,* 397 U.S. 552. Here, as discussed above, the Conference Report to the 1968 amendment shows that Congress not only refused to alter the Secretary's construction, but indeed endorsed it.

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[10] The initial House version of Section 407(b)(2)(C)(ii) was identical to the one Congress enacted.

4. The decision in the only other case[11] of which we are aware that has considered the question of the relationship between AFDC and unemployment compensation, is consistent with our position. In *Burr* v. *Smith,* 322 F. Supp. 980 (W.D. Wash.), affirmed, 404 U.S. 1027, AFDC applicants challenged the constitutionality of the Washington statute and welfare regulation implementing Section 407(b)(2)(C)(ii). The regulation provided: "An otherwise eligible child shall be ineligible for AFDC–E with respect to any week for which his father receives unemployment compensation." 322 F. Supp. at 983. The district court in *Burr* held that "[a] father cannot avoid disqualification simply by failing to register for and receive unemployment compensation." 322 F. Supp. at 984, n. 5. Although the federal statute was not in issue in *Burr,* the district court noted that the state regulation was required by federal law, and the court then concluded that, as thus construed, the exclusion provision was valid.

5. The district court erroneously construed the mandatory provision because, we submit, it did not recognize the significance of Section 402(a)(7)'s requirement that an AFDC applicant develop income from all available resources.[12] The decision below permits the circumvention of that requirement in order to insure that "families of unemployed fathers, like other fami-

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[11] The proper construction of Section 407(b)(2)(C)(ii) is presently at issue in *Salamone* v. *Mason,* Civil Action No. M–74–656 (D. Md., filed June 25, 1974). On November 4, the district court issued an order staying proceedings pending this Court's decision in this case.

[12] Unfortunately, the government did not call the district

lies applying for AFDC, should be assured of receiving an income equal to the state standard of need, irrespective of their eligibility to receive outside income" (J.S. App. 14A). This result is, however, simply not what Congress intended. Congress could, of course, have provided that unemployment compensation be treated as any other resource, *i.e.*, causing a reduction rather than a termination of AFDC; and had it wished to do so in 1968 it would have repealed the provision which permitted states to deny AFDC if unemployment compensation was available. Instead, it adopted the mandatory bar provision.

Moreover, the district court's decision does not merely place families with unemployed fathers on the same footing as other AFDC families. The circumvention of the obligation to exhaust unemployment compensation has important implications for the administration of the AFDC–UF program because it will have the anomalous result of shifting significant costs of assisting the unemployed from the unemployment compensation program to the AFDC program. Twenty-four states in addition to Vermont participate in the program for unemployed fathers. Since the amount the states pay as unemployment compensation frequently varies from family to family, it is impossible to estimate in what proportion of cases AFDC payments would exceed state unemployment insurance

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court's attention to Section 402(a)(7). The statutory construction issue arose at oral argument. The government's memorandum of March 27, 1973, asserted that the question whether Section 407(b)(2)(C)(ii) permitted an AFDC applicant to refuse unemployment compensation was not presented since all plaintiffs had in fact received such benefits.

benefits. The instances of such excess are likely to be substantial, however, and whenever there is such a difference, the decision below will probably lead to the shifting of a substantial number of claims which would otherwise be borne by the unemployment compensation program to the state and federally-funded AFDC program.[13] Commissioner Philbrook of the Vermont Department of Social Welfare estimates that for fiscal year 1975, the additional AFDC costs to Vermont under the district court's decree could be $1 million (App. 101–102). The additional federal share in Vermont would then be approximately $2 million.

As we have shown above, Congress viewed unemployment insurance as the primary source through which unemployed parents would receive financial assistance, and intended AFDC to be available only when unemployment insurance was unavailable. The effect of the decision below would be to permit the federally-assisted AFDC program to be used to subsidize unemployed parents for what they consider inadequacies in a state compensation program. That is not what Congress intended when it barred AFDC benefits to persons who "receive" unemployment compensation.

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[13] The AFDC program is funded by appropriations from general federal and state revenues. 42 U.S.C. 620; 33 V.S.A. 2554, 2703. Vermont's general assistance program is also funded by general state revenues. 33 V.S.A. 3003. In contrast, unemployment compensation in Vermont and other states is paid from a separate fund, which consists of funds collected from private employers, 21 V.S.A. 1324–1327, 1358–1359, and money credited to the State's account in the federal Unemployment Trust Fund, 42 U.S.C. 501–504, 1101–1108, which is also funded by a tax on employers, 26 U.S.C. 3301–3311. *California Human Resources Dept.* v. *Java*, *supra*, 402 U.S. at 126.

Indeed, the district court's decision would shift more of the costs to the AFDC program than the plan which Congress tried but then twice rejected. As noted above, between 1961 and 1968, states were granted the option to deny part or all AFDC benefits "if the unemployed parent * * * receives unemployment compensation." 75 Stat. 76. If this provision were in effect today and a state chose not to bar AFDC benefits completely, Section 402(a)(7), as construed by the Secretary, would nonetheless require that a family's AFDC benefits be reduced by the amount of unemployment compensation actually received or potentially available. Under such a system, then, in contrast to the district court's result, the unemployment compensation program would bear at least part of the cost of assisting the family.

In 1967 and 1968, the Senate passed bills which would have retained this optional system, but on both occasions, the House insisted upon the present mandatory bar embodied in Section 407(b)(2)(C)(ii). H. Rep. No. 1030, 90th Cong., 1st Sess. 57; H. Rep. No. 1533, 90th Cong., 2d Sess. 49. After Congress has twice rejected a proposal which would have permitted the extension of AFDC to families without reducing the costs to be borne by unemployment compensation, it is indeed anomalous that the district court would construe Section 407(b)(2)(C)(ii) to permit a father to choose to forego unemployment compensation altogether in order to receive AFDC benefits. That holding enables the unemployment compensation program to be relieved entirely of the burden of assisting the family while the entire burden will be shifted to the AFDC program.

Admittedly, the mandatory bar provision may produce harsh results where there is a significant disparity in benefits between AFDC and unemployment compensation.[14] Congress, however, concerned with increasing costs of the AFDC program, deliberately adopted the mandatory bar in 1968. The provision accomplishes its primary purposes of reducing the financial burdens of the AFDC program. In addition, although not articulated in the legislative history, the provision may also serve to induce states to upgrade their unemployment compensation programs, or to develop or upgrade general assistance programs.

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[14] This harshness is mitigated to some extent by the fact that the termination of AFDC lasts only as long as unemployment compensation is available. In some cases the disparity in benefits will be reduced by state general assistance program benefits. Such a program exists in Vermont although the record is unclear as to its benefit levels.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, and the case should be remanded for consideration of the constitutional issues.[15]

Respectfully submitted.

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December 1974.

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[15] Although this Court has on occasion considered issues not decided by the court below (*e.g.*, *Dandridge* v. *Williams*, 397 U.S. 471, 476, n. 6), we submit that it would be inappropriate to do so here. Appellees' constitutional claims were not reached by the district court, and while these claims were argued below, in our view the claims should be considered by the district court in light of a proper construction of the statute.

U.S. GOVERNMENT PRINTING OFFICE: 1974